GOH HOCK CHOY v. ZAIBI MOTOR SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[SUIT NO: 22NCC-2-01-2013]
30 JANUARY 2015

CONTRACT: *Breach – Contract for purchase of car – Defendant's implied undertaking to plaintiff that car free from encumbrance and customs clearance – Car sold at public auction by bank – Customs Department seized car for failure to obtain customs clearance – Whether good, lawful and valid title passed to plaintiff – Whether plaintiff relied on defendant's undertaking – Whether plaintiff a bona fide purchaser – Whether plaintiff entitled to claim amount paid to defendant for purchase of car – Whether defendant's breach caused plaintiff to suffer damages – Sale of Goods Act 1957, s. 14*

SALE OF GOODS: *Motor car – Contract of sale – Implied condition – Plaintiff's reliance that defendant had right to sell car to plaintiff – Customs Department seized car for failure to obtain customs clearance – Whether plaintiff convinced that documents pertaining to car were in order – Whether good, lawful and valid title passed to plaintiff – Whether defendant breached condition and warranty of contract of sale – Whether defendant's breach caused plaintiff to suffer damages – Sale of Goods Act 1957, s. 14*

LIMITATION: *Accrual of cause of action – Breach of contract for purchase of car – Defendant's failure to pass good, lawful and valid title to plaintiff – Failure to obtain customs clearance – Claim against defendant – Whether cause of action arose when car seized and forfeited by Customs Department – Whether claim time-barred – Limitation Act 1953, s. 6(1)*

The plaintiff purchased a Mercedes Benz car ('the car') from the defendant which was thought to be an imported used car. The plaintiff paid the full purchase price of the car for the sum of RM820,000 to the defendant. Before the car was purchased, the plaintiff was of the understanding, *inter alia,* that the car complied with all relevant laws, free from any encumbrance and customs clearance. The plaintiff sold the car to one Siow Chung Peng ('Siow') for RM900,000. Siow paid RM420,000 and the balance of RM480,000 was paid pursuant to a hire-purchase facility obtained by Siow from the bank. However, Siow defaulted in the payment and the car was returned to the bank where it was subsequently sold at a public auction. On 20 February 2009, the Customs Department ('Customs') seized the car as it was found that the car was in fact a new car and no customs clearance was obtained. Since the car was seized, the bank could not pass good title to the purchaser when the car was auctioned off by the bank. The bank sued the plaintiff for RM1,044,800.92 for the refund of the purchase price and for breach of contract. The plaintiff was then adjudged a bankrupt and the bank filed a proof of debt with the Insolvency Department. Having obtained the sanction from the Insolvency Department, on 2 January 2013, the plaintiff

filed a suit against the defendant for the sum of RM1,044,800.92 for failure to provide a valid, effective and proper title to the car. It was contended, *inter alia,* that (i) the defendant breached the contract of sale of the car; and (ii) the defendant must be found liable for the action by the bank against the plaintiff. The issues that arose for consideration, *inter alia,* were (i) whether there was a breach of contract by the defendant; (ii) whether the plaintiff was entitled to claim for the full amount as claimed by the bank; (iii) whether there was a direct breach of contract by the defendant that caused the plaintiff to face the claim by the bank; (iv) whether plaintiff's claim was time-barred; (v) whether the defendant failed to deliver valid, lawful and effective title to the plaintiff in respect of the car; and (vi) whether the breach of contract by the defendant resulted in the plaintiff suffering damages that could be anticipated and known by the defendant.

Held (ordering defendant to pay RM820,000 with interest and costs to the Official Assignee):

(1) The plaintiff relied on the implied condition that the defendant had a good title and had the right to sell the car to the plaintiff. There was also an implied warranty by the defendant that the vehicle was free from any charge or encumbrance in favour of any third party which was not declared or known to the plaintiff before or at the time when the contract of sale was made. The plaintiff relied on the defendant to be convinced that the documents pertaining to the car were in order. Further, there was an implied undertaking by the defendant that it was capable of delivering good, lawful and valid title to the plaintiff in respect of the car. The defendant had breached the condition and warranty of the contract of sale when it failed to deliver good title of the car to the plaintiff. (s. 14 of the Sale of Goods Act 1957). (paras 16, 21, 25 & 26)

(2) There was no explanation on how the amount pertaining to the proof of debt had been arrived at. However, after the sum of RM820,000 was paid to the defendant, the plaintiff was deprived of the ownership of the car when it was seized and forfeited. Further, the plaintiff lost at least RM820,000 because of the amount in the proof of debt as claimed by the bank. As such, the plaintiff was entitled to claim the amount of RM820,000. (paras 27, 28 & 30)

(3) The plaintiff and the bank were put in their current predicament because the defendant failed to give valid, lawful and proper title in relation to the car. Further, the plaintiff must settle the amount of more than RM1 million as stated in the proof of debt in order to be absolved from bankruptcy. It was the defendant's duty to ensure that proper and lawful title could be enjoyed by the plaintiff. The defendant's breach of contract resulted in the plaintiff being liable for the claim made by the bank. (paras 30, 32 & 37)

(4) There was nothing to suggest that at the time the car was purchased, the plaintiff had any reasons to sue the defendant. As such, the plaintiff's action was not time-barred since the cause of action arose when the car was seized and forfeited by the Customs on 20 February 2009. Since the plaintiff's writ was filed on 2 January 2013, the claim was filed well within the time of six years as required under s. 6(1) of the Limitation Act 1953. (paras 33 & 34)

(5) The relevant documents showed by the defendant gave the plaintiff the impression that the defendant had obtained customs clearance in order to sell the car as an imported used car. However, the car was seized as it was not an imported used car but a brand new car where no customs clearance was obtained for the car to be sold by the defendant. The plaintiff was a *bona fide* purchaser and the responsibility fell on the defendant when the car was seized and forfeited by the Customs. The defendant's breach of contract had resulted in the plaintiff suffering damages that could be anticipated by the defendant. (paras 39, 40, 41 & 43)

Case(s) referred to:
Affin-ACF Finance Bhd v. Phang Ngan Heong [2010] 7 CLJ 592 HC ***(refd)***
Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee [2010] 5 CLJ 23 CA ***(refd)***
Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin [2001] 1 CLJ 768 HC ***(refd)***
Public Finance Berhad v. Ehwan Saring [1996] 1 CLJ 628 HC ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 128(1), 135(1)(d)
Limitation Act 1953, s. 6(1)
Sale of Goods Act 1957, ss. 4(1), 12(2), (3), 14

For the plaintiff - AM Pillai (Chong Ian Shin with him); M/s Arulampalam & Co
For the defendant - V Malini; M/s Nik Hussain & Partners

Reported by Kumitha Abd Majid

JUDGMENT

Abu Bakar Jais JC:

Introduction

[1] This judgment relates to the suit after full trial commenced by the plaintiff against the defendant. The plaintiff had sued the defendant arising from the purchase of a car from the defendant. The suit against the defendant was on the basis the same had failed to give good title to the car to the plaintiff after the sale of the car to the latter.

The Trial

[2] The trial of the case was concluded in two days with the plaintiff calling four witnesses and the defendant calling one witness. The witnesses for the plaintiff were Goh Hock Choy, the plaintiff himself, Nazlina binti

Mohd Nazalan, assistant legal officer at the Insolvency Department, Selangor Branch, Mohd Nizam bin Sungib, senior assistant director 2, Customs Department and Khiruddin bin Nek, senior customs officer, Enforcement Division Selangor. The sole witness for the defendant was Foong Tack Kon, the defendant's sales manager.

Material Facts

[3] The material facts of the present case are that the plaintiff bought a Mercedes Benz's car from the defendant which was thought to be an imported used car on 28 November 2001 for RM820,000. This was paid in full by the plaintiff. Before purchasing the car, the plaintiff was of the understanding that the car complied with all relevant laws and regulatory inspection had been done and approved by the Customs Department. The plaintiff also was of the understanding that the car is free from any encumbrance, title claim and customs clearance.

[4] On 2 June 2005 the plaintiff having bought it from the defendant, sold the car to one Siow Chung Peng ('Siow') for RM900,000. However Siow only paid RM420,000 to the plaintiff while the balance of RM480,000 was paid by Public Bank Bhd which later became Public Islamic Bank Bhd (PIBB). This is because Siow had contracted for the hire-purchase facility from the bank. The car was later returned to the bank after Siow defaulted. Since Siow defaulted, the bank subsequently sold the car at a public auction on 2 March 2007.

[5] On 20 February 2009 the car was seized by the Customs Department as the supposedly used car was in fact a new car where there is no customs clearance. As the car was seized, there was no good title that passed between the bank and the purchaser when the car was auctioned off by the bank.

[6] As the bank cannot pass good title and as the car was seized and forfeited by Customs Department, PIBB sued the plaintiff on 22 September 2010 for RM1,044,800.92 for the refund of the purchase price and for breach of contract. There is no clear explanation how this amount was arrived at, except to deduce it is so because it included interest charged by the bank. For this suit, the plaintiff brought the defendant as third-party.

[7] Having been sued by PIBB, the plaintiff enquired about the status of the car and it was confirmed by the Customs Department that the same is seized and forfeited and the decision is final.

[8] Later the plaintiff was adjudged a bankrupt and in view of this, PIBB withdrew the suit while the plaintiff withdrew the third-party claim against the defendant.

[9] Nonetheless PIBB proceeded to file proof of debt with the Insolvency Department for the same sum of RM1,044,800.92 as earlier claimed against the plaintiff and the proof of debt was accepted and recorded as plaintiff's

bankrupt's statement of affair. In view of this, the plaintiff in turn sued the defendant in the present case before this court as the defendant had failed to give a valid, effective and proper title to the car.

[10] The plaintiff has obtained sanction from the Insolvency Department to continue with this suit now against the defendant.

The Plaintiff's Contentions

[11] In gist the plaintiff says since the defendant had warranted the car has the customs clearance and there is no encumbrance for the plaintiff to own the car, the plaintiff agreed to buy the same from the defendant. The plaintiff asserts the failure of the defendant to give good title to the car means the defendant had breached the contract of sale for the said car to the detriment of the plaintiff. The plaintiff says the defendant therefore must be found liable for the action by PIBB in proceeding to file proof of debt with the Insolvency Department for the sum of RM1,044,800.92 as the proof of debt was accepted and recorded as plaintiff's bankrupt's statement of affair. The plaintiff says he has the duty to pay this amount in order to free himself from bankruptcy and for this the defendant must be made accountable.

The Defendant's Contentions

[12] In summary the defendant says for all intents and purposes the car was cleared by the customs before the same was sold to the plaintiff. All the documents pertaining to the car including the approved permit had been verified. The Customs Department had certified that the car has no encumbrance and had been lawfully imported into the country and all duties have been paid. The defendant says the plaintiff before the car is bought, was fully aware that all relevant documents pertaining to the car were fully in order and the latter had bought the car by relying on these documents which at any point of time were genuinely verified to be true. The defendant asserts it could not be liable for the seizure and forfeiture of the car by the Customs Department and any damages to the plaintiff as at all material times all documents were in order and verified by the Customs Department. The defendant also contended that the plaintiff's claim is time-barred as the car was bought on 28 November 2001 and there is 12 years-time gap between that time and the filing of the action. The defendant also asserts the proof of debt lodged by PIBB is actually for RM1,077,891.05 and therefore different from the amount RM1,044,800.92 as claimed by the plaintiff.

Court's Findings

[13] This court will state the findings of this case based on the issues that arose as narrated below.

Whether There Is A Breach Of Contract By The Defendant

[14] There can be no doubt that when the plaintiff bought the car from the defendant, he was of the view of ultimately being able to enjoy and own the car as the rightful owner. In that sense he is not alone in holding this view.

A Any purchaser of any product would similarly be put in the same position. Putting it simply, the plaintiff would not have bought the car if he could not own the car. There is no reason to pay the defendant if the car is not under the name of the plaintiff as the legitimate owner.

B **[15]** There is no doubt too that there was implied warranty from the defendant that the car can be rightfully owned by the plaintiff as long as payment is made to the defendant. Why would anyone sell a car if he or she cannot pass good title?

C **[16]** In this regard the plaintiff could only rely on the defendant to be convinced that the documents pertaining to the car were in order to satisfy himself that he can rightfully be the owner of the same upon the payment to the defendant. These documents including the approved permit were shown by the defendant. The defendant had in that sense warranted that the car is without any encumbrances including customs clearance for the plaintiff to own the car.

D **[17]** In any event, based on the facts of this case, the plaintiff's statutory rights cannot be denied because of the provisions of the Sale of Goods Act 1957 despite the defendant denying it has given any warranty to the plaintiff.

[18] Section 4(1) of the same provides for sale and agreement to sell and
E it states:

> A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price …

[19] Sections 12(2) and (3) of the said Act respectively provide for
F condition and warranty and they read:

> A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.
>
> A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right
G to reject the goods and treat the contract as repudiated.

[20] Further s. 14 of the said Act provides for implied undertaking as to title and it reads:

> In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is -
H
> (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods …;
>
> (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
>
I (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

[21] The plaintiff therefore by virtue of s. 14 of the Sale of Goods Act 1957 as seen above, clearly could rely on the implied condition on the part of the defendant that firstly the defendant had a good title and had the right to sell the car to the plaintiff and secondly there is also an implied warranty by the defendant that the vehicle is free from any charge or encumbrance in favour of any third party not declared or known to the plaintiff before or at the time when the contract of sale was made. However, as found by this court, the defendant had clearly breached the condition and warranty of the said contract of sale when the defendant failed to deliver good title of the car to the plaintiff when the car was seized and forfeited by the customs.

[22] In this regard the case of *Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin* [2001] 1 CLJ 768 held that:

> The transfer of property stated in s. 4(1) of the Sale of Goods Act 1957 ("the Act") constitutes the essence of a contract of sale and the seller who does not so transfer the property breaks the basic duty created by the contract and there is a total failure of consideration.
>
> There was an implied condition on the part of the defendant under s. 14(a) of the Act that he had a right to sell the car. The defendant did not have the right of possession to the car and could not consequently give it to the plaintiff. The plaintiff therefore had a right to sue for the price paid as money had and received on a total failure of consideration.

[23] Also relevant is the case of *Affin-ACF Finance Bhd v. Phang Ngan Heong* [2010] 7 CLJ 592 where Amelia Tee J held that:

> The registration of the car in the name of the hirer was irrelevant as it did not amount to the passing of a good and valid title from the defendant to the plaintiff. For that to happen, it would be necessary for the plaintiff to continue to have a good and valid title to the car until the end of the hire purchase period so that it could, in turn, pass a good and valid title to the hirer. The seizure of the car by the police had dispossessed the plaintiff of the car thus making it impossible for the plaintiff to pass any title to the hirer later. In any case, a passing of ownership at the time of the sale alone would be insufficient; the ownership had to continue to remain with the plaintiff for there to be a meaningful passing of ownership.
>
> Pursuant to s. 14(a) of the Sale of Goods Act 1957, there was an implied condition on the part of the defendant (as seller) that he would have the right to sell the car. As that condition had been broken, the plaintiff could (as purchaser) rescind the contract and demand a return of the purchase money. The plaintiff had the right to sue the defendant for the purchase price paid as money had and received on a total failure of consideration.
>
> … The plaintiff, however, was entitled to a refund of the entire purchase price of the car from the defendant ie RM120,200, it was immaterial that the defendant only received RM80,000 from the plaintiff and the a down-payment of RM40,200 had already been paid directly by the hirer to the defendant.

[24] Further, in the case of *Public Finance Berhad v. Ehwan Saring* [1996] 1 CLJ 628 where in similar fashion the vehicle in question was seized by the customs for an allege offence under s. 135(1)(d) of the Customs Act 1967 and was subsequently forfeited under the provisions of s. 128(1) of the same Act, it is said:

> The conduct and action on the part of the appellant clearly show that when the said agreement was entered into, the appellant represented that they are the owners of the said vehicle which would mean that they represented that they were capable of giving a good title to the respondent …
>
> The appellants' title was defective and hence no good title could be transferred to the respondent. The agreement had been frustrated when the said vehicle was seized …

[25] Based on these cases as highlighted and on the balance of probabilities, there is indeed an implied undertaking by the defendant to the plaintiff, first that the defendant is able and free of any encumbrance to sell the car and secondly the defendant is capable of delivering good, lawful and valid title to the plaintiff in respect of the car.

[26] Therefore because of the facts of the present case before this court as stated, on the balance of probabilities too there is a breach of the contract by the defendant when the car was seized and forfeited by the customs.

Whether The Plaintiff Is Entitled To Claim The Full Amount As Claimed By PIBB

[27] There can be no doubt there is no explanation on how the amount pertaining to the proof of debt is arrived at when PIBB lodged the same. Whether the amount is RM1,077,891.05 or RM1,044,800.92, the only clear fact is that neither amount has been proven to be rightly due to the plaintiff.

[28] What is clear however and not disputed by the defendant is the fact plaintiff handed RM820,000 to the defendant for the price of the car including the value of a traded in used BMW car belonging to the plaintiff at the value of RM200,000. Therefore it cannot be seriously disputed that RM820,000 is the amount that the plaintiff is entitled to claim because after paying this amount to the defendant, he is deprived of the ownership of the car when the car was seized and forfeited.

[29] Therefore this court is not minded to grant the claim of RM1,044,800.92 as claimed by the plaintiff but only to hold that the rightful amount established by the plaintiff without any dispute is RM820,000.

[30] On this too, although the plaintiff later sold the car to Siow for RM900,000, suggesting a profit of RM80,000 for the plaintiff, the fact remains at the present moment because of the failure of the defendant to pass good title, the plaintiff is faced with the proof of debt more than that amount of RM900,000. And on this, there is clear evidence from PW2 Nazlina binti Mohd Nazalan, assistant legal officer at the Insolvency Department,

Selangor Branch that the plaintiff must settle the amount more that RM1 million as stated in the proof of debt in order to be absolved from bankruptcy. So not only it is not true to suggest there is profit of RM80,000 for the plaintiff but the plaintiff also lost at least RM820,000 because of the amount in the proof of debt as claimed by PIBB.

Whether There Is A Direct Breach Of Contract By The Defendant That Caused The Plaintiff To Face The Claim By PIBB

[31] The claim by PIBB is in the form of proof of debt at the Insolvency Department it has filed against the plaintiff. There is evidence as stated earlier by PW2, the officer from the Insolvency Department that plaintiff must settled this amount in the proof of debt in order to be absolved from bankruptcy.

[32] The breach of contract by the defendant as explained earlier resulted in the plaintiff being liable for the claim made by PIBB. It is therefore clear because of the direct breach in the contract by the defendant, the plaintiff is now facing the claim by PIBB. Further both the plaintiff and PIBB are put in their current predicament because the defendant had failed to give valid, lawful and proper title to the car.

Whether The Plaintiff's Claim Is Time-barred

[33] The plaintiff's claim cannot be time-barred because the cause of action arose not from the time the plaintiff bought the car on 28 November 2001 as contended by the defendant. It arose only when the car was seized and forfeited by the customs on 20 February 2009. And since the plaintiff's writ is filed on 2 January 2013, the plaintiff's claim was filed well within time of six years as required by s. 6(1) of the Limitation Act 1953.

[34] In this regard it must be appreciated there is nothing to suggest that at the time the car was bought, the plaintiff has any reasons to sue the defendant. The basis to sue the defendant only came about when the car was seized. In this regard PW4 the customs officer had testified and confirmed in court that he had issued the seizure notice in p. 44 of the common bundle of documents.

[35] As to when the cause of action arose is illustrated by the Court of Appeal's case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee* [2010] 5 CLJ 23 where it states:

> The cause of action would only accrue when the EPF Board refused to grant the authority for the withdrawal of the additional amount of RM30,000. The six year limitation period would not begin to run from the date of death of the deceased member, but from the date when the EPF Board rejected the dependent's claim and merely approved the payment of RM2,000 as the additional amount on 27 September 2001 and 9 July 2002.

[36] Similarly in the present case time start to run not at the time of the purchase of the car but when the same was seized and forfeited. Therefore the contention of the defendant that the plaintiff's claim is time-barred cannot with respect be accepted by this court.

Whether The Defendant Failed To Deliver Valid, Lawful And Effective Title To The Plaintiff In Respect Of The Car

[37] There can be no doubt that the plaintiff had to rely on the defendant in respect of all documents pertaining to the car. The documents must indicate that a valid, lawful, proper and effective title to the car can be passed on the plaintiff. After all the defendant is selling the car to the plaintiff. What good would these documents be if lawful title cannot be enjoyed by the plaintiff?

[38] And in this regard it is the duty of the defendant to ensure that proper and lawful title could be enjoyed by the plaintiff. Regrettably this has failed to be done by the defendant when the customs seized the car.

Whether The Defendant Is Responsible For The Seizure And Forfeiture Of The Car By The Customs

[39] The defendant had shown all relevant documents for the car to the plaintiff. These documents gave the impression to the plaintiff that customs clearance had been obtained by the defendant to sell the car as an imported used car to the plaintiff.

[40] Alas that is no so as the car was seized and forfeited by customs as it was not an imported used car but a brand new car where there is no customs clearance obtained for the car to be sold by the defendant.

[41] Therefore it is clear that the responsibility falls on the defendant when the car was seized and forfeited by the customs. In this regard the defendant cannot blame anyone else for the same. It is the action of the defendant that has resulted in the car being seized and forfeited. There could not be a finding that the plaintiff should take responsibility for the same as the plaintiff is a *bona fide* purchaser of the car.

Whether The Breach Of Contract By The Defendant Resulted In The Plaintiff Suffering Damages That Can Be Anticipated And Known By The Defendant

[42] As stated the defendant was paid by the plaintiff RM820,000 for the car. After paying that amount, good, lawful and proper title to the car still could not be enjoyed by the plaintiff. The plaintiff instead is now facing the proof of debt more than RM1 million against him.

[43] Putting aside the proof of debt for that amount because there is no clear proof as to how this amount was arrived at, the undeniable fact is plaintiff had paid the defendant RM820,000. In this regard, at least this is the amount the plaintiff had suffered as damages because after paying this

amount there is no good title that was handed over by the defendant to the plaintiff. Therefore it is most unfortunate that the defendant failed to see the breach of contract by the defendant has indeed resulted in the plaintiff suffering damages that can be anticipated and known by the defendant.

Decision

[44] Based on the foregoing the defendant is ordered to pay RM820,000 with 5% interest per annum from date of judgment until realisation and costs of RM30,000 to be paid to the Official Assignee.